serving Buffalo, which is operated by Adelphia. Cablevision, in which AT&T has a 36-percent interest, has networks in the Bronx, Brooklyn, Long Island, and most of the Westchester/Rockland area. TimeWarner, in which MediaOne already has a 25-percent interest, has extensive systems in and around New York City, as well as in upstate New York. MediaOne operates cable networks centered around Ossining, about 35 miles north of Manhattan, and elsewhere in Westchester, Rockland, and Orange Counties, giving it about 125.000 New York subscribers.

Still further: AT&T's Kingston and Rhinebeck networks are directly adjacent to MediaOne's networks in Ulster and Dutchess Counties and to Time Warner's franchises in Newburgh. New Paltz, and Saugerties. Both AT&T and Cablevision have extensive franchises in Northern New Jersey, many of which are directly adjacent to Time Warner's New York City network. as well as Time Warner's franchise in Palisades Park. Cablevision has 600,000 subscribers with networks in and around Bergen, Morris, Essex, Union, and Passaic Counties.

<sup>&</sup>lt;sup>71</sup> TCI owns a third of the venture and Adelphia the other two-thirds. See TCI/Adelphia Combo Complete, supra note 5, at 52.

<sup>&</sup>lt;sup>72</sup> See sources cited supra note 4.

<sup>&</sup>lt;sup>73</sup> Cablevision Systems Corp., 1998 Form 10-K (SEC filed Mar. 31, 1999).

<sup>&</sup>lt;sup>74</sup> Time Warner operates networks in Manhattan, Queens and West Brooklyn. *See Television & Cable Factbook*, *Cable 1999*, at D-1077 (Warren Publ'g 1999 ed.). Time Warner also holds a 50-percent interest in Staten Island Cable. Staten Island Cable, *About Us* (visited Aug. 19, 1999) <a href="http://www.sicable.com/html/about\_us.html">http://www.sicable.com/html/about\_us.html</a>.

<sup>75</sup> Television & Cable Factbook, supra note 74, at D-1080.

<sup>&</sup>lt;sup>76</sup> *Id.* at D-1033.

<sup>&</sup>lt;sup>77</sup> TCI Press Release, TCIC and Cablevision Complete Transaction (Mar. 4, 1998).

Cablevision also holds a Newark franchise serving 50,000.<sup>78</sup> And Cablevision (36 percent owned by AT&T) holds all the franchises in Southern Connecticut that are closest to Time Warner's New York City territory, including networks in Greenwich, Darien, Easton, New Canaan, Redding, Stamford, Weston, Westport, Wilton, Bridgeport, Norwalk, and Fairfield with a total of about 200,000 subscribers.<sup>79</sup>

### B. Effects In The MVPD Market

There can be no doubt about the need to encourage additional competition in MVPD markets. That is proved by the fact that, where overbuilds have occurred, there have been significant consumer benefits. The Commission has found that in overbuild communities "incumbent cable operators have responded to entry in a variety of ways, such as lowering prices, adding channels at the same monthly rate, improving customer service, or adding new services such as interactive programming services." A recent study by the General Accounting Office has made similar findings, noting that cable operators have responded to competition with "pricing modifications, an expansion of programming, new services, and improved customer service." The National Cable Television Association has likewise noted that cable's response to competition (including competition from overbuilders) includes "investment in more and better programming, as well as in technological upgrades and enhancements": the "provision of

<sup>&</sup>lt;sup>78</sup> Television & Cable Factbook, supra note 74, at D-1032.

<sup>&</sup>lt;sup>79</sup> *Id.* at D-215, D-219.

<sup>80</sup> Fifth Video Markets Report, 13 FCC Rcd at 24,394 [¶ 207].

<sup>&</sup>lt;sup>81</sup> United States General Accounting Office, *Telecommunications: The Changing Status of Competition to Cable Television*, at 14-15 (July 8, 1999).

more packaging options"; and "efforts to keep price increases under control . . . despite their own increasing costs."82

More generally, the economic reality and high degree of concentration of MVPD markets is well established. In 1992, Congress recognized the existence of a market for services provided by multichannel video programming distributors.<sup>83</sup> And the Commission has repeatedly concluded that, even with the inroads made by satellite services, MVPD markets are very far from competitive.<sup>84</sup>

When the Commission approved the AT&T/TCI merger, it recognized that no one had even argued "that the merger will eliminate an actual or potential significant competitor in markets for multichannel video programming distribution." As AT&T was not then in the cable business at all, the Commission could assume from the lack of comments raising the issue that "AT&T is unlikely to quickly become a significant competitor in the distribution of multichannel video programming absent the merger." But now that AT&T is the largest MVPD in the country — and that it proposes to merge with the third largest — this picture has

<sup>82</sup> NCTA Comments, supra note 69, at 31.

<sup>&</sup>lt;sup>83</sup> See 47 U.S.C. § 522(13) (defining an MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution serivce, a direct boradcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming").

<sup>&</sup>lt;sup>84</sup> See, e.g., Fifth Video Markets Report. 13 FCC Rcd at 24,287 [¶ 6] (finding "that cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace. As of June 1998, 85% of all MVPD subscribers received video programming service from local franchised cable operators compared to 87% a year earlier.").

<sup>85</sup> AT&T/TCI Order, 14 FCC Rcd at 3171 [¶ 20].

<sup>&</sup>lt;sup>86</sup> *Id.* at 3173 [¶ 22].

changed fundamentally, for the applicants are now uniquely likely to be realistic potential competitors in a market where additional competition is much needed and not likely to be come from any comparable source.

The Commission has acknowledged, when examining a merger of this sort, that the transaction may have "a greater effect on future, rather than present, market performance. This is especially true if a merger may be a strategic response to declining entry barriers, in which an incumbent firm is seeking to avoid competition by eliminating a potentially significant future competitor." Even outside the cable industry, moreover, the Commission has recognized that contiguity may be particularly significant — that two firms, dominant in the provision of the same services in adjoining regions, may be economically significant potential competitors in one another's regions, at least where entry barriers are not prohibitively high. In the present cable setting, the evidence establishes the two critical facts: the likelihood of potential competition and the near-unique position of the nearby cable company to provide this competition. Thus, applicants are distinctively positioned potential competitors to improve the MVPD market.

This Commission has made it clear in other contexts that it would consider any and all plans for future market participation, "regardless of whether they have been formally adopted or backed by a commitment of resources, as potentially relevant to the analysis of market participants. Accordingly, the facts and circumstances concerning such planning should be

<sup>&</sup>lt;sup>87</sup> Memorandum Opinion and Order, Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 FCC Rcd 19,985, 20,036 [¶ 96] (1997) ("BA/NYNEX Order").

<sup>88</sup> *Id.* at 20,025-29 [¶¶ 73-79].

forthrightly presented to the Commission. <sup>89</sup> If this is, indeed, the Commission's position, it must require AT&T to provide details of any plans that TCI (and any other company in which AT&T has an attributable interest) has formulated for entry into the MVPD market in MediaOne's region, and vice versa. Without such information and in light of the applicants' burden of proof, the Commission cannot approve this merger.

## C. Effects In The Market for Last-Mile Broadband Transport

As potential overbuilders, AT&T and MediaOne are distinctively positioned to compete against one another not only in the provision of traditional video programming but also in the provision of high-speed, broadband Internet transport in the "last mile." This market is dominated today by cable operators. The proposed merger would eliminate the possibility of competition between two of the most sophisticated cable systems in the country.

Broadband Internet access services occupy a market all their own. These services are typically 10 to 100 times faster than the alternatives most widely available today — dial-up or ISDN telephone lines. In practice, the speed gap is even wider than the raw numbers suggest. because broadband services typically remain "up" continuously, eliminating the often significant delays associated with dial-up and account verification. This wide gap in performance has clear

<sup>&</sup>lt;sup>89</sup> *Id.* at 20,027 [¶ 75].

<sup>&</sup>lt;sup>90</sup> See Declaration of Robert H. Gertner, ¶ 13 ("Gertner Declaration") (attached). Although the Commission did not have to decide in the AT&T/TCI merger "whether narrowband and broadband Internet access services provided to residential and small business customers are sufficiently different to support the conclusion that they are in separate markets." AT&T/TCI Order. 14 FCC Rcd at 3205 [¶ 92], the evidence is overwhelming that high-speed, broadband, Internet access is a market unto itself

economic consequences. Narrowband services — particularly dial-up connections on analog phone lines — are not substitutes for broadband access.<sup>91</sup>

This Commission has already defined "broadband" as the capability of supporting bandwidth in excess of 200 kilobits-per-second in the last mile. <sup>92</sup> This, in the Commission's view, is the speed at which next-generation or "advanced" Internet services become possible. This speed "is enough to provide the most popular forms of broadband — to change web pages as fast as one can flip through the pages of a book and to transmit full-motion video." But higher-definition, on-demand video will require one megabyte-per-second speeds or more, roughly 20 times the speed of a fast dial-up connection. <sup>94</sup>

The wide gulf in performance makes broadband and narrowband services qualitatively different and places them in separate markets for purposes of competitive analysis. As the FCC's Office of Plans and Policy has noted, analog modem bandwidth "is largely insufficient" to support real-time video transmissions over the Internet: broadband connections, by contrast, already support these services. 95 Broadband transport enables content providers to deliver

<sup>&</sup>lt;sup>91</sup> See generally Gertner Declaration, supra note 90, ¶ 12.

<sup>92</sup> Advanced Services Report. 14 FCC Rcd at 2406 [¶ 20].

<sup>93</sup> *Id*.

<sup>&</sup>lt;sup>94</sup> See Interview by Financial Times (London) with John Patrick, IBM Vice President, Nov. 5, 1997, at 22 ("At one million bps, real-time videoconferencing becomes possible."); Michele Carleton, No More DLC Nice Guy, Telephony (Mar. 30, 1998) <a href="http://www.internettelephony.com/">http://www.internettelephony.com/</a>; Andrew W. Davis, Cable Modems: A High-Bandwidth Solution to Internet Access, Networked Multimedia for Bus. (Jan./Feb. 1998) <a href="http://www.bcr.com/dvcmag/janfeb/dvc7p6.html">http://www.bcr.com/dvcmag/janfeb/dvc7p6.html</a>.

<sup>&</sup>lt;sup>95</sup> Kevin Werbach, Office of Plans and Policy, FCC, *Digital Tornado: The Internet and Telecommunications Policy* at 41 (OPP Working Paper No. 29, Mar. 1997).

streaming video and audio, video instant messaging, interactive advertising, video conferencing and traditional (enhanced) video programming — none of which can be delivered effectively over narrowband transport lines. The graphics, CD-quality audio, and real-time video that can be delivered over broadband connections "constitute a different level of Internet and online interaction and satisfaction."

The qualitative differences are mirrored in significant usage differences. Even though a faster broadband connection time would actually reduce time spent, the evidence is clear that users of broadband service actually spend more time on line. @Home's subscribers, for example, are reported to be "spending three to four times as many hours online per month as they do on the dial-up side, and they're viewing twice as many page views." Websites with streaming audio and video generate more traffic, attract visitors that stay longer, and sell more goods. High-speed access, in other words, serves a separate market of consumers and services. As America Online concludes, "there is no substitutable service that can be used to provide the

<sup>&</sup>lt;sup>96</sup> "[T]he graphics, imaging, audio and video contents of web pages has outstripped the capability of analog telephone connections to deliver content at satisfactory rates." Cable Modems: A High-Bandwidth Solution to Internet Access, supra note 94.

<sup>&</sup>lt;sup>97</sup> E. Melloul, Argus Research Corp., Investext Rpt. No. 3372812, At Home Corp. — Company Report, at \*1 (Dec. 16, 1998).

<sup>&</sup>lt;sup>98</sup> C. Grice, *Feeling @Home*. CNET News.com (Dec. 17, 1998) (last accessed on Feb. 19, 1999) <a href="http://www.news.com/newsmakers/Jermoluk/jermoluk/jermoluk.html">http://www.news.com/newsmakers/Jermoluk/jermoluk.html</a> (quoting @Home CEO Tom Jermoluk). There are also lifestyle changes associated with cable modem users. Such users tend to move their computers into living rooms, dining rooms, and kitchens. They also consider the Internet to be an appliance of sorts. Dan Brekke, *High-Speed Habits*, Wired, June 1999, at 90.

<sup>&</sup>lt;sup>99</sup> J.W. Reynolds, Wedbush Morgan Securities, Inc., Investext Rpt. No. 3336224, RealNetworks, Inc. — Company Report, at \*4 (May 20, 1998).

same functionality and speed." Broadband services therefore "comprise a distinct input product market." 100

Reflecting the different quality and consumer demand, broadband services also cost much more. For residences, such services are currently targeted at customers who spend over \$100 per month on telephone service. Users pay premium prices for broadband access. The price gap between broadband and narrowband access is greater than the gap that separates landline from wireless telephone service. And a recent study by MIT economist Jerry Hausman concluded that "the price of narrowband Internet service does not affect the demand for broadband Internet

<sup>100</sup> Comments of America Online, Inc. at 50, Joint Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries, CS Docket No. 98-178 (FCC filed Oct. 29, 1998) ("AOL's Comments on AT&T/TCI"). The FCC itself has recognized that high-speed access services are unique transport technologies that make possible upgraded end-user Internet access, both in terms of functionality and speed. See Werbach, supra note 95, at 73-75.

<sup>101</sup> As explained by Sprint CEO William Esrey: "We're talking about the 16 million residential customers who spend more than \$110 per month. They are more than qualified for this type of service." Elizabeth Douglass & Karen Kaplan, Sprint Unveils Plans for Voice and Data Network, L.A. Times, June 3, 1998, at A1. See also Mike Farrell, BellSouth to Speed Up Fiber Outlay, Multichannel News, Oct. 12, 1998, at 95 (Yankee Group analyst Jim Wahl finds MediaOne well-positioned in the telephony and high-speed data market, attracting customers who spend upward of \$100 per month on communications services).

Reconciliation Act of 1993, 12 FCC Rcd 11.266, 11.324, 11.325 n.258 (1997) ("A key aspect of our analysis of the extent to which wireless services are being used as a substitute for wireline services is to look at the prices for both types of services." "[T]he average monthly cellular bill was \$51, but the average monthly residential wireline rate ... was \$19.54."). The average price of the basic residential POTS line used for dial-up connection is \$19 per month. FCC, Reference Book of Rates, Price Indices and Expenditures for Telephone Service 1 (July 1998). By contrast, ADSL services are priced at around \$40-\$60 per month, as are cable modem services. See, e.g., Bell Atlantic, Infospeed DSL Pricing (visited Aug. 19, 1999) <a href="http://www.bellatlantic.com/infospeed/more\_info/pricing.html">http://www.bellatlantic.com/infospeed/more\_info/pricing.html</a>; Advanced Services Report, 14 FCC Rcd at 2444, chart 3 [\* 87].

service."103 As a result, "[1]ast mile broadband data transport is not in the same antitrust market as last mile narrowband data transport."104

The same conclusion was reached last year by the Canadian regulators. In a July 1998 decision, the Canadian Radio-TV and Telephone Commission held "that there are two markets for access services: the lower and higher speed access service markets. In the Commission's view, lower and higher speed access services are not substitutes, given the limited availability of the latter, the fact that higher speed access services are in the earlier stages of development, and the price differential between lower and higher speed service offerings." 105

In this market, cable operators are dominant today, and there is no basis in current market developments for a prediction of a turn-around that could make it proper to evaluate the present merger not on the current marketplace facts but on a hypothesized different future. <sup>106</sup> Cable operators began offering high-speed Internet service in 1996; by 1998 they were serving over 100 local markets. <sup>107</sup> One-third to one-half of all cable networks already support two-way

<sup>&</sup>lt;sup>103</sup> Declaration of Professor Jerry A. Hausman ¶ 4-10, attached as Appendix A to AOL's Comments on AT&T/TCI, *supra* note 100.

<sup>&</sup>lt;sup>104</sup> *Id.* ¶¶ 10, 15.

<sup>&</sup>lt;sup>105</sup> Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by "Broadcast Carriers." Telecom Decision CRTC 98-9, ¶ 64 (July 9, 1998) ("Telecom Decision CRTC 98-9").

<sup>&</sup>lt;sup>106</sup> Gertner Declaration, supra note 90, ¶ 14-16.

<sup>&</sup>lt;sup>107</sup> Paul Kagan Associates, Cable TV Technology, Aug. 26, 1998, at 3, cited in NCTA, 1998 Cable Television Year-End Review 1998 (visited Aug. 19, 1999) <a href="http://www.ncta.com/glance.html">http://www.ncta.com/glance.html</a>.

service, or will very soon.<sup>108</sup> The service is now available to an estimated 20 million homes, or roughly 20 percent of the U.S. mass market.<sup>109</sup> It will reach 30 million by the end of 1999.<sup>110</sup> An estimated 13 million cable modems will be deployed in the next three years.<sup>111</sup> As the FCC's Office of Plans and Policy concludes, "[t]he cable industry's broadband platform makes cable an optimal medium for transmitting large amounts of digital information — data, graphics, and video — at high speeds."<sup>112</sup>

<sup>108</sup> Third Annual Report, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 12 FCC Rcd 4358, 4442 [¶ 172] (1997) (citing The Yankee Group, Bringing Broadband Home: New Networks for New Services, Dec. 1995, at 28); see also D.S. Shapiro et al., Deutsche Morgan Grenfell Inc., Investext Rpt. No. 1964154, Modems — Industry Report, at \*3 (Aug. 27, 1997) ("[W]hat is often overlooked is that several operators have been upgrading their networks diligently for the past three, four, and five years, and a great deal of this money has already been spent."). These upgrades also produce ancillary benefits, allowing cable companies to offer additional programming channels or other revenue producing services. Forrester Research, People & Technology Strategies (Aug. 1998).

<sup>&</sup>lt;sup>109</sup> Paul Kagan Associates, *supra* note 107, at 3 (as of mid-1998). This number is estimated to grow to 39 million homes by 2000, and to more than 67 million homes by 2005. *Id*.

<sup>&</sup>lt;sup>110</sup> J.J. Bellace et al., Merrill Lynch Capital Markets, Investext Rpt. No. 2706388. Wireline Communications Equipment — Industry Report, at \*1 (June 22, 1998). DSL, by comparison, is estimated to serve 750,000 to 1 million lines by this time. *Id.; see also* Alan Breznick, *High-Speed Data Players Set to Compete: Suburban Markets Become a New Focus For Data Service Providers*, Cable World (Dec. 7, 1998) <a href="http://www.cableworld.com/articles/News98/1998120709.htm">http://www.cableworld.com/articles/News98/1998120709.htm</a>.

High Speed Internet Access to Reach 16 Million U.S. Households by 2002, According to Forrester, Bus. Wire, Sept. 1, 1998 (predicting cable modems will capture 80 percent of the high-speed market). But see Study Sees Cable Modem Deployments Surpassing ADSL Installations by 2003, Broadband Networking News, Aug. 4, 1998 (estimating 10 million cable modem users by 2003).

Future in Terms of the Past 76 (OPP Working Paper No. 30, Aug. 1998). The Consumer Federation of America concurs: "For many, perhaps most, American citizens, their first opportunity to obtain high bandwidth Internet access will be through cable systems." Petition to Deny of Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ at 11, Joint Application of AT&T Corp. and Tele-

Cable is thus positioned to be the dominant provider of mass market, broadband Internet access services. And, in fact, as noted below, cable wires, through @Home and Road Runner. currently provide the overwhelming share of broadband transport to residential customers. Moreover, to the extent competitive position can be gauged by relative *capacity* rather than actual usage — as an AT&T expert has elsewhere suggested that it should be 114 — cable's edge is overwhelming and likely to remain so indefinitely. Finally, as explained below, the regulatory hobbling of DSL as the main near-term potential rival makes all the more improper any reliance on a wholly conjectural prediction of loss of cable dominance.

In this concentrated and cable-dominated broadband market, the present merger would eliminate a realistic and much needed potential for competing provision of broadband transport.

Communications, Inc. for Approval of Transfer of Control of Commission Licenses and Authorizations, CS Docket No. 98-178 (FCC filed Oct. 29, 1998).

Cable has the "first mover advantage," with "a substantial lead" over digital subscriber lines ("DSL"). See D.H. Leibowitz, Donaldson, Lufkin & Jenrette Securities, Investext Rpt. No. 2815791. Media and Communication Statistics/November Review: Global — Industry Report, at \*52 (Dec. 17, 1998); J.J. Bellace, et al., Merrill Lynch Capital Markets, Investext Rpt. No. 2755639, Data Networking — Industry Report, at \*1 (Sept. 10, 1998) ("Cable modems have an early lead over xDSL technologies."); G.T. Powers et al., Cruttenden Roth Inc., Investext Rpt. No. 3360257, International Fibercom, Inc. — Company Report, at \*9 (June 10, 1998); D.H. Leibowitz et al., Donaldson, Lufkin & Jenrette Securities, Investext Rpt. No. 2771430, Media and Entertainment — Industry Report, at \*19 (Sept. 23, 1998) (cable is in "a superior near-term and long-term position"); Study Sees Cable Modem Deployments Surpassing ADSL Installations by 2003, Broadband Networking News, Aug. 4, 1998 (cable operators are projected to deploy five times as many high-speed modems over the next four years as telephone companies will deploy for DSL).

<sup>114</sup> That is, despite the fact that in 1986 AT&T controlled an estimated 75 percent of the long-distance market, the interLATA industry was "robustly rivalrous" because competitors had enough fiber-optic transmission capacity in place to accommodate the total volume of interLATA traffic — and plans to add more capacity. M.E. Porter, Competition in the Long Distance Telecommunications Market: An Industry Structure Analysis, iii & fig. 7 (Oct. 1987).

Residential consumers today have virtually no choice for such service: by and large, there is only one cable company providing the service, DSL is unavailable and hobbled, and no other service is available. The importance of the realistic potential for overbuilding is therefore at its zenith.

This merger would eliminate that potential, which is especially great for AT&T and MediaOne for the reasons explained above.

### D. Effects In The Market for Broadband Content

An additional potential competition problem is created by the proposed merger's bringing under common control of @Home and Road Runner. Those two companies are the two dominant portal providers over broadband, and applicants' own policies have kept that portal market tightly concentrated. The obvious potential competition between them is therefore particularly needed, yet would be eliminated by this merger.

With its acquisition of TCI, AT&T acquired a 58-percent voting interest in @Home, the largest provider of broadband Internet access services over cable. The second largest — Road Runner — is currently owned by MediaOne and Time Warner. With its ownership interests in both @Home and Road Runner. AT&T would effectively control 95 percent of the market for

able Internet access subscribers in the U.S. The remaining cable modem subscribers are served by services like Knology's OLOBAHN. Adelphia's Power Link, and Charter Communications/ EarthLink's Pipeline. See Knology, Knology Internet (visited Aug. 18, 1999) <a href="http://www.knology.com">http://www.knology.com</a>; Adelphia, Power Link (visited Aug. 19, 1999) <a href="http://powerlink.adelphia.net/">http://powerlink.adelphia.net/</a>; NCTA, Delivering New Products and Services (visited Aug. 19, 1999) <a href="http://www.ncta.com/home.html">http://www.ncta.com/home.html</a>.

<sup>116 &</sup>quot;I think At Home benefits because At Home and Road Runner probably get merged together now." Statement of Alan Gould, Media Analyst - Gerard Klauer Mattison, CNN Moneyweek: AT&T, Comcast and Microsoft Come to Terms (CNN cable broadcast, May 8, 1999. "There are big reasons to merge Road Runner and @Home," said Scott C. Cleland, an analyst with Washington-based Legg Mason Precursor Group. "The economies of scale you would get

dominant among all residential broadband users, AT&T would control 80 percent of the overall broadband Internet access market.<sup>117</sup>

@Home and Road Runner are more than providers of high-speed access. As currently marketed, @Home is a tied-together package of access and content. The cable operators that make up @Home's immediate family offer broadband Internet access through @Home exclusively. 118 End users who want to gain such cable access to the Internet must sign up with @Home to do so. Competing providers of access service and content — companies like AOL — cannot reach their customers via cable at all, unless their customers first sign up with @Home, a

from having one set of overhead means there are a lot of savings to be had." Michael Hiltzik, AT&T's Bid to Move Into Cable Could Lead to New Regulation, L.A. Times, Apr. 26, 1999, at C1.

aubscribers. @Home had 260,000 subscribers, and Road Runner had 257,000. Together, @Home and Road Runner provided service to 95 percent of all subscribers to high-speed cable services and 80 percent of subscribers to high-speed, broadband services generally. Cable accounts for 85 percent of the United States' 646,000 high-speed internet users, the rest consisting of xDSL and satellite subscribers. See Cable Modem Customer Count Tops 800,000, Cable Datacom News (May 1999) <a href="http://www.cabledatacomnews.com/may99/may99-1.html">http://www.cabledatacomnews.com/may99/may99-1.html</a>; xDSL.com, Deployment and Projections (visited Aug. 19, 1999) <a href="http://www.xdsl.com/content/resources/deployment\_info.asp">http://www.xdsl.com/content/resources/deployment\_info.asp</a>; The Battle for the Last Mile, Economist, May 1, 1999, at 59; see also David Lieberman, Score Two for Speedier Internet: Announcements Send Stocks Catapulting, USA Today, June 22, 1999, at 1B; DirecPC Experiencing Slow Consumer Growth. But is Optimistic, Comm. Daily, Apr. 8, 1999.

<sup>118@</sup>Home is "the leading provider of broadband Internet services over the cable television infrastructure to consumers. By virtue of our relationships with 21 cable companies in North America and Europe, we have access to approximately 65.0 million homes, which includes exclusive access to over 50% of the households in the United States and Canada cable of receiving cable television." At Home, 1999 Form 10-Q, supra note 61, at 8.

direct competitor. Broadband customers over cable are powerfully tied to either @Home or Road Runner as their portal provider.

The market evidence at hand already compels the conclusion that this tying arrangement is extremely effective at freezing out other providers of broadband content over the cable wires. and hence from the overall residential broadband market. Customers who use @Home are demonstrably unlikely to retain another online service provider — for which they would have to pay on top of @Home. One recent study found that America Online subscribers who began to use @Home canceled their AOL accounts 66 percent of the time. This is precisely what @Home's owners intend. As Leo Hindery, AT&T's new head of broadband services has said, any cable customer living under the shadow of @Home must "go to an online service provider through my screens. According to Professor Lawrence Lessig of Harvard Law School.

"[r]ather than linking you to a place where you might choose your ISP (out of the thousands that compete to deliver cheap, reliable service), the network will pick your ISP for you — either Road Runner or AtHome, which means (if the recent mergers go through) AT&T for short. Choice is being coded away; your ISP will come bundled with your cable modem."

<sup>119</sup> See Gertner Declaration, supra note 90, ¶ 19 ("AT&T ties the provision of its last mile broadband transport service with access (ISP) services. This prevents potential rivals in the provision of ISPs service from competing with @Home.").

<sup>&</sup>lt;sup>120</sup> @Home Trumps AOL, CNET News.com (Apr. 26, 1999) <a href="http://www.news.com/News/Item/0,4,35688,00.html">http://www.news.com/News/Item/0,4,35688,00.html</a>.

<sup>&</sup>lt;sup>121</sup> Transcript of FCC Hearing, *supra* note 48, at 33, Unofficial hearing transcript, *cited in* AOL's Comments on AT&T/TCI, *supra* note 100, at 13.

Lawrence Lessig, Cable Blackmail: Should Someone Pick Your ISP for You?, The Industry Standard (June 18, 1999) <a href="http://www.thestandard.com/articles/display/0,1449,5198,00.html">http://www.thestandard.com/articles/display/0,1449,5198,00.html</a>.

Time Warner is not currently a member of @Home; like MediaOne itself, Time Warner has established its own, exclusive Internet access service with Road Runner. Although it appears likely that AT&T would merge the two under its own control, even if it chose to keep them separate, its control over this section of the nation's broadband services would be nearly complete. Almost every household that subscribed to a cable modern service would run through AT&T, and thus be economically tied to @Home/Road Runner as portal provider.

The combining of so large a portion of all broadband transport creates an obvious foreclosure problem, as described below. In addition, however, the effective combining of @Home and Road Runner eliminates significant future competition between them as the two dominant current providers of broadband portal content. As noted above, that competition is real today, and the forward-looking additional potential is especially great. The two firms are distinctly well suited as potential content competitors, because of the networks they have in place

Warner Inc., MediaOne Group, Inc., Microsoft Corp., Compaq Corp., and Advance/Newhouse." Road Runner, Company Profile <a href="http://www.rr.com/rdrun/company/index.html">http://www.rr.com/rdrun/company/index.html</a>. Road Runner began offering service in September 1996 in Ohio. Road Runner Press Release. Time Warner's Road Runner Launches in Akron/Canton Area (Sept. 10, 1996). In September 1996, MediaOne, then Continental Cablevision, launched its own cable Internet access service called Highway 1, now called MediaOne Express, which the companies announced in December 1997 would be merged into one joint venture. Richard Tedesco, Continental Cablevision Intros 'Net Highway, Broadcasting & Cable, Sept. 23, 1996, at 52. MediaOne Express would be rebranded MediaOne Road Runner in March 1999 (nine months after the venture was formed), according to Vice President of Internet Services Tom Cullen. MediaOne Says AT&T Telephony Partnership Has Strong Upside, Comm. Daily, Feb. 11, 1999.

<sup>&</sup>lt;sup>124</sup> See sources cited supra note 116.

<sup>&</sup>lt;sup>125</sup> Cf. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 478 (1992) (while facially pro-consumer conduct like low pricing may be hard to condemn, case of facially anticompetitive conduct is "just the opposite," with significant burden of being explained away).

for distributing content within their systems<sup>126</sup> and because of the proximity of such neighboring systems as AT&T/Cablevision and TimeWarner/MediaOne. An elimination of such potential competition should not be allowed.

# III. THE MERGER WOULD CAUSE SUBSTANTIAL FORECLOSURE OF COMPETITION IN RELATED BROADBAND MARKETS

The combination of firms controlling an overwhelming share of broadband access today, even if those firms would not be competing with one another, creates a classic problem of foreclosure for firms vertically related to the broadband access market. The key facts are that AT&T's share of residential subscribers to broadband services in the United States would grow from 40 percent to 57 percent and that @Home and Road Runner together would serve 80% of all current residential subscribers to broadband transport. The result would be a classic foreclosure problem with AT&T, effectively monopolizing a resource needed as an "input" by a number of vertically related markets. 127

This problem cannot be sidestepped by pointing to the possibility that current dominance of cable broadband transport may be dissipated over time by other technologies. Such an argument is ordinarily insufficient in merger analysis and is suspect on its face — especially in a

<sup>&</sup>lt;sup>126</sup> See Sara Robinson, Mulitmedia Transmissions are Driving Internet Toward Gridlock, N.Y. Times, Aug. 23, 1999, at C1.

<sup>127</sup> Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45-47 (1984) (O'Connor, J., concurring in the judgment); U.S. Healthcare. Inc. v. Healthsource, Inc., 986 F.2d 589, 595-96 (1st Cir. 1993) (per Boudin, J.); Barry Wright Corp. v. ITT Grinnell Corp., 727 F.2d 227, 236-37 (1st Cir. 1983) (per Breyer, J.) (recognizing that "a three-year 'foreclosure' of 50 percent of the relevant market . . . sounds like a significant foreclosure") (citing Standard Oil Co. v. United States, 337 U.S. 293 (1949); Lessig v. Tidewater Oil Co., 327 F.2d 459, 468 (9th Cir.), cert. denied, 377 U.S. 993 (1964); Mytinger & Casselberry, Inc. v. FTC, 301 F.2d 534 (D.C. Cir. 1962)); D. Melamed, Exclusionary Vertical Agreements (Apr. 2, 1998) <a href="http://www.usdoj.gov/atr/public/speeches/1623.htm">http://www.usdoj.gov/atr/public/speeches/1623.htm</a>.

setting where (unlike with the Clayton Act) the burden is on the merging parties — for the argument seeks to explain away a demonstrable current problem by hypothesizing some future, merely wished-for solution.<sup>128</sup> The evidence of current market facts do not allow applicants to carry their burden. Wireless broadband is off in the distance as a widely available service for residential users, as far as any record evidence indicates, and cannot be seriously relied on by applicants. Only DSL service from telephone companies warrants discussion, yet it cannot play the role that applicants have assigned to it.

From a technical perspective, DSL, provided over telephone company loops, is the one. serious competitive alternative to cable today. Technologically, however, there are significant limits on the near-term availability of the service for a large number of consumers who will have a choice of cable or nothing for broadband transport; for all such customers, cable is the bottleneck through which other broadband-dependent firms must pass. In addition, the current regulatory environment is a disincentive to serious, head-to-head competition from DSL. With regulation so sharply out of balance, telephone-company DSL cannot currently be ranked as a competitive force capable of effectively disciplining the AT&T/MediaOne conglomerate.

To begin with, the Bell companies are excluded entirely from the core backbone market.

AT&T (i.e., cable) has the most extensive and capacious long-distance network in the country. If backbone markets were fully competitive with plenty of capacity to spare, this might not matter very much. But they are in fact highly congested and far from fully competitive. The Bell companies rank among the few companies with sufficient resources and expertise to enter the

<sup>&</sup>lt;sup>128</sup> See Gertner Declaration, supra note 90, ¶ 14.

<sup>&</sup>lt;sup>129</sup> See Robinson, supra note 126 (describing network congestion).

markets aggressively and to deploy new capacity quickly. Telephone companies should be playing integral roles in the effort to expand backbone capacity. They have the technology, workforce, and financial resources; the main impediments they face are regulatory.

Bell companies face further limits on their participation in other, adjacent markets. They may distribute, but may not manufacture, equipment used on customer premises. They are therefore limited in how closely they may collaborate with equipment vendors, and have not bought equity stakes in them, as AT&T has done with General Instruments. A second body of regulation excludes Bell companies themselves from providing Internet search engines or content of any kind. Bell companies are required to set up fully separate subsidiaries for that purpose.

A likely upshot of the mandated unbundling together with TELRIC pricing is that local carriers can hope to recover only their original costs on new, risky investment in facilities and services that turn out to be very popular. New, risky investments that fail, by contrast, are charged to their shareholders, through the vehicle of price-cap regulation. The more advanced

<sup>&</sup>lt;sup>130</sup> 47 U.S.C. § 273(a).

technical standards. D.H. Leibowitz et al., Donaldson, Lufkin & Jenrette Securities, Investext Rpt. No. 2771430, Media and Entertainment — Industry Report at \*19 (Sept. 23, 1998). AT&T/Lucent developed one standard, Carrierless Amplitude/Phase Modulation ("CAP"). As of December 1996, 90 percent of all deployed ADSL hardware was based on that standard, and "most ADSL trials have used CAP technology." Alan Stewart, *The Battle for Bandwidth*. Comm. News, May 1997, at 36. But several bodies favor a different one, Discrete Multitone ("DMT"). *ADSL*, Edge, May 9, 1997; Anne Knowles, *Incompatible ADSL Standards Duke It Out*, InfoWorld, Dec. 23/30, 1996, at TW1. *See also* J. P. Parmelee et al., Credit Suisse First Boston Corporation, Investext Rpt. No. 2809325, Telecom Equipment/Wireline Quarterly — Industry Report, at \*26 (Nov. 30, 1998) ("[D]espite significant rhetoric regarding aggressive service plans, the fact that standards for ADSL are still evolving is likely to slow deployments.").

<sup>&</sup>lt;sup>132</sup> 47 U.S.C. § 274(a).

the technology deployed, the greater the regulatory risk, because in such circumstances further technological advance is least likely to deliver the instant, ongoing improvements in performance and declines in price that the Commission might presume into existence indefinitely into the future.

This is not just the Bell companies' view: AT&T has said all this itself, in vehemently objecting to proposals to put cable on the same regulatory footing as telephone companies.

According to AT&T's Chairman, "It's not fair. It's not right. Worse, it would inhibit industry growth and competition. No company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others." <sup>133</sup>

"[T]he last thing that government should do," echoes AT&T's Senior Vice President, "is create uncertainty that would have a chilling effect on, and perhaps even retard, these investments." <sup>1134</sup>

This regulatory imbalance significantly affects the impact of the proposed AT&T-MediaOne merger. If they faced a comparable regulatory environment, the Bell companies might well be in a position to limit the anti-competitive harms presented by the union of AT&T and MediaOne. But that is simply not the case today. As a result, this merger is likely to have significant and harmful effects on a variety of markets both upstream and downstream from the cable network. In particular, this merger would position the combined company to dominate the

<sup>&</sup>lt;sup>133</sup> C. Michael Armstrong, Chairman and CEO, AT&T, *Telecom and Cable TV: Shared Prospects for the Communications Future*, Statement Before the Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998).

<sup>134</sup> Statement of James Cicconi, General Counsel-Executive Vice President, AT&T, quoted in MCI Restarts Marketing Local Residential Service in N.Y., Comm. Daily, Feb. 4, 1999.

markets for broadband portal services, streaming software and video programming, IP telephony, and broadband equipment and software.

### A. The Market for Broadband Portals

Broadband portal services, which, among other things, provide the first-screen access to the Internet for subscribers to broadband transport, is a separate market. The economic significance of portals — which plainly find it efficient to operate and to sell advertising nationally — is confirmed by the rapid growth into multibillion dollar companies not only of AOL but of Yahoo!, Excite, and Lycos. This value is based in substantial part on their unique ability to gather customer-specific information for use in targeted advertising. The ability of consumers to click through to other web sites obviously does not deprive the portal of its value as entry point, home page, and advertising medium. TCI Chairman John Malone refers to the portals that AT&T/TCI would control as a "walled garden" to which the cable company would govern access. 137

<sup>135</sup> A "portal" aggregates and indexes Web content and constitute "gateways" to that content. In the world of high-speed access, portals have been likened to TV networks, such as ABC or CBS, in that they aggregate and provide access to various types of programming. Peggy O'Neill of Dataquest states, "Think of the opportunity if you could be there at the dawn of ABC or NBC... That's what investors are seeing when they buy into these portals. They believe they're going to become the big networks of the Internet." Matt Beer, *Portals of Profits:*\*\*Advertisers Drool at Chance to Aim Their Messages Precisely, S.F. Examiner, Jan. 20, 1999, at C1. Portals also sell advertising on their sites, often tailoring an advertiser's message to an individual or group of users. Matt Beer, \*Portal Web Sites Help Break Shoppers' Impulse Barrier\*, Star Tribune (Minneapolis-St. Paul), Jan. 31, 1999, at 6D.

<sup>&</sup>lt;sup>136</sup> Apparently, @Home already charges "significantly more for ads than its competitors." Corey Grice, *Road Runner Beefs Up Advertising Push*, CNET News.com (Aug. 4, 1999) <a href="http://www.news.com/News/Item/0,4,40120,00.html">http://www.news.com/News/Item/0,4,40120,00.html</a>>.

<sup>&</sup>lt;sup>137</sup> D.S. Shapiro, Deutsche Bank Research, Investext Rpt. No. 2783084, Cable & Satellite Newsletter — Industry Report, at \*2 (Oct. 19, 1998).

In the broadband portal services market, the AT&T/MediaOne merger clearly raises the prospect of foreclosure. AT&T's subscribers, to obtain broadband access, are required to take the @Home portal, thus locking up 40 percent of the *current* broadband subscribership.

MediaOne's broadband subscribers (like those of Time Warner) use Road Runner as their exclusive portal. And "clicking through" is a particularly inadequate substitute for direct portal access for broadband-specific content, because indirect connections to distant servers, as opposed to local servers where content can be cached and directly reached without numerous intermediate hops, can easily defeat the speed of access required for such content. 138

AT&T's direct share of broadband subscribers would be substantially increased by the MediaOne acquisition — from 40 percent to at least 57 percent. These exclusive portal arrangements between @Home and cable operators extend for at least another three years. and barriers to entry into the broadband transport market are significant. The shares of foreclosed customers, therefore, are substantial. The effect would be a lessening of investment by other portal providers in the services that make broadband access attractive. That diminution in the competitive state of the broadband portals market would harm not only consumers who buy

<sup>&</sup>lt;sup>138</sup> See infra Part III.B.

<sup>139</sup> This percentage is derived by adding the total number of @Home subscribers (260,000 as of the end of the first quarter 1999) to the total number of Road Runner subscribers over MediaOne's cable network (109,000). Of course, AT&T's purchase of MediaOne also means that it will obtain a 50-percent controlling interest in Road Runner. If we assume that AT&T effectively controls Road Runner, AT&T's share of broadband Internet access subscribers reaches 80 percent. See sources cited at supra note 117.

<sup>&</sup>lt;sup>140</sup> See At Home Corp., 1997 Form 10-Q, at 8-9 (SEC filed Nov. 14, 1997) (indicating that exclusivity obligations in favor of @Home with Cablevision, CSC Parent Corp., Comcast. Cox. Kleiner. Perkins, Caufield & Byers and TCI expire in June 2002).

broadband transport over cable wires. It would also harm the other access providers, such as local exchange carriers offering DSL, who depend on a vibrant portal services market to sell their competing broadband transport. As a result, competition would be harmed in the transport market itself.

The exclusivity of portal/transport arrangements that creates this anticompetitive harm is, of course, anything but inevitable.<sup>141</sup> Local exchange carriers provide competing service providers with equal access to *their* transport services. Several small cable operators in this country provide cable modem service without the exclusivity of @Home, Road Runner, or their own portal, allowing competing providers to use the broadband transport.<sup>142</sup> Recently, GTE and AOL completed a two-month trial in Florida, and both AOL and CompuServe were allowed to

<sup>&</sup>lt;sup>141</sup> Indeed, non-exclusivity has been mandated in Canada. See Telecom Decision CRTC 98-9, supra note 105, ¶ 77 (finding that cable operators who offer high-speed Internet services must offer those services to independent ISPs on a tariffed basis).

States. It provides a high-speed Internet access service called OLOBAHN over its own cable lines. Knology, *Knology Internet*, <a href="http://www.knology.com">http://www.knology.com</a>. In September 1998, Knology signed an agreement with another broadband Internet access provider named MindSpring. MindSpring had approximately 1,228,000 customers at the end of the second quarter, up from 1,157,000 at the end of the prior quarter. MindSpring News Release, *MindSpring Announces Second Quarter Results and Accelerated Growth Initiative* (July 27, 1999) <a href="http://www.mindspring.net/aboutus/press-releases/1999/0727.html">http://www.mindspring.net/aboutus/press-releases/1999/0727.html</a>. Knology's cable customers thus have a choice between MindSpring's Internet service and Knology's own offering. A handful of other cable operators are doing the same. Charter Cable, has an agreement with EarthLink, an unaffiliated ISP, that allows EarthLink to provide high-speed transport across Charter's network to EarthLink end users.

link into GTE's cable networks. 143 The trials gave consumers the ability to sign up for AOL directly over cable networks without first going through GTE's ISP subsidiary. 144

Exclusivity, however, is the hallmark of this merger. The combination of AT&T and MediaOne threatens to eliminate everyone other than @Home and Road Runner from the broadband portals market. This is not in the public interest, and the Commission must not permit it.

### B. The Markets for Streaming Software and Video Programming

The proposed merger also creates a foreclosure problem in the market for streaming video. From the cable operators' perspective, the most important piece of software running on the customer's equipment is the software to provide "streaming video." At the other end of the cable, customers are linked to local caching servers. These servers store and deliver frequently-used data so as to reduce traffic loads throughout higher levels of the Internet. Residing on the server at the cable head-end, streaming-video software retrieves from the originator a digitally encoded video file, then passes it through, in real time or delayed, to one or more customers as requested.

There are two major competitors in the market for streaming video software:

RealNetworks and Microsoft. Other firms, in the Sun/Java family of providers, are potential

<sup>&</sup>lt;sup>143</sup> See John Borland, GTE, AOL Unveil Cable ISP Trials, CNET News.com (Jun. 14, 1999) <a href="http://www.news.com/News/Item/0.4.37788.00.html">http://www.news.com/News/Item/0.4.37788.00.html</a>>.

<sup>&</sup>lt;sup>144</sup> According to GTE, the companies were able to install this capability in a geographic area serving 80,000 potential customers with "a single one-time investment of \$60,000." GTE News Release, GTE Demonstrates Ease of Cable Open Access to Multiple ISPs; Clearwater Trial Shows One-Time Investment of Less Than \$1 Per Home Would Provide Consumer Choice (June 14, 1999).